No. 19987

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

JOHN S. GORSUCH,

Appellant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,

Appellee.

See also Vol. 3349

OBJECTION TO DUHAME'S MOTION TO INTERVENE AND FOR LEAVE TO FILE A PETITION FOR REHEARING

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OBJECTION TO DUHAME'S MOTION TO INTERVENE AND FOR LEAVE TO FILE A PETITION FOR REHEARING

Fireman's Fund Insurance Company, hereinafter called "Surety", objects to the Motion to Intervene and For Leave to File a Petition for Rehearing filed by the co-executors of the Estate of Elmer W. Duhame, Deceased, hereinafter called the "Duhame Executors" or "Duhame", and respectfully prays that said motion and petition be denied.

ARGUMENT

I. The Duhame Executors Were Parties To The Appeal

The Duhame Executors cry out that they "have effectively been precluded from raising the issues . . . before either the trial of Appellate Courts . . ." (Duhame's Motion p. 7) The fact is that they were parties to the appeal, but chose to sit it out and should not now be heard to complain:[1]

1. Only one Judgment, dated December 17, 1964, was entered. (R. 89)

2. Gorsuch filed a Notice of Appeal "from the final judgment entered in this action on December 17, 1964." (R. 94); and the Clerk of the District Court mailed a copy thereof to Duhame's attorneys. (R. 101)

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1. The principle here involved is not unlike that in State v. Armijo, 39 N.M. 502, 50 P.2d 852, 855 (1935) where the Court, in ruling on the timeliness of an affidavit of disqualification of a judge, said:

> "We cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decides to take a plunge. The plunge into the pool of litigation with an affidavit disqualifying the trial judge must be made on a belief of prejudice theretofore entertained, and not on any subsequent discovery of such belief of prejudice resulting from an adverse ruling."

3. The Bond for Costs on Appeal designated the Duhame Executors as obligees. (R. 96)

4. The Designation of Contents of Record on Appeal was served on Duhame's attorneys; it, too, referred to the appeal "from the final judgment". (R. 95)

5. Duhame's attorney was present at the hearing before the District Court on Gorsuch's motion to dismiss for want of an indispenable party and orally resisted said motion in addition to urging the Duhame motion for summary judgment. (R. 99, Minute Entry of Oct. 12, 1964) Duhame served the latter motion upon Gorsuch (R. 72) who of course was involved therein and who appealed from the summary judgment as well as the remainder of the judgment.

6. The Statement of Points filed by Gorsuch was served on Duhame and included specifications that the District Court erred in granting the Duhame motion for summary judgment and in ordering the return of the Duhame collateral. (R. 104)

7. Gorsuch's opening brief in this Court included specifications that the District Court erred in granting the Duhame motion for summary judgment and in ordering the return of the Duhame collateral. (Brief for Appellant, pp. 7, 8)

8. Duhame chose not to file a brief in this Court, notwithstanding his knowledge of the above specifications.

The foregoing facts appearing of record, we submit, disclose that the Duhame executors were not "effectively" or at all "precluded from raising the issues" before either the District Court or this Court. In addition, and here we go outside the record, as has Duhame's attorney:

(a) On June 29, 1965 Surety's attorney wrote Duhame's attorney:

> "Because of the indemnity agreement executed by Elmer W. Duhame and Dr. Angus J. DePinto, the Duhame Estate and Dr. DePinto are interested in the outcome of the appeal; more particularly, in having the judgment entered by Judge Craig affirmed. In view of this fact I will appreciate any suggestions you or Joe Jenckes may have with regard to the brief to be filed on behalf of Fireman's Fund Insurance Company."

(b) On January 24, 1966 Surety's attorney wrote Duhame's attorney advising him of the date set for oral argument in this Court ". . . in order that he also may take such part therein as he may feel will be in the best interest of the Duhame Executors." On February 7, 1966 Duhame's attorney called Surety's attorney and said he felt the briefs covered the matter fully, that he felt he could not contribute anything at oral argument and <u>for those reasons</u> he deemed it unnecessary to take any part in the argument.

II. The Relief Sought on Rehearing Is Not Proper

The sum and substance of the pending motion, as urged by the Duhame Executors, is that this Court erred in not ordering a dismissal of the action; and they seek to have the following language deleted from the opinion:

> "We do not direct dismissal of the action because Fireman's Fund Insurance Company may wish to proceed against Duhame and DePinto to recover the cash and corporate stock which it was erroneously ordered to transfer to them."

We do not agree.

This Court, on an appeal from the entire judgment and not merely from a part thereof, has held that Doig was an indispensable party, that the District Court should have dismissed the complaint and that it erred in not doing so. Instead, the District Court ordered the Surety to release $350,000 in cash and corporate stock. It also adjudged the Surety guilty of contempt and fined it $1,750 per week for its failure to surrender the cash and corporate stock. (R. 101) Faced with this situation the Surety had no alternative; it surrendered the collateral it had been holding and thus purged itself of the contempt and the fine.

If the complaint had been dismissed by the District Court, as this Court has held should have been done, the Surety would still have possession of the cash and stock.

Under these circumstances it was but natural and just and right that this Court point out the way for the District Court, on motion of the Surety, to correct its error and restore the status quo by ordering the return of the collateral. Only in this manner can justice be accomplished, for surely the Duhame Executors should not be permitted to keep that which they should not have received in the first instance.

The fact that Duhame subsequently settled with Doig and Provident, and that a decree of distribution has been entered in the Duhame estate, are beside the point. The settlement was made because Duhame deemed it to be in the estate's best interest that this be accomplished. The wherewithal so to do was the collateral held by the Surety which the District Court erroneously ordered released to Duhame.

CONCLUSION

Duhame's motion (pp. 3, 4) cited and quoted from Mulaney v. Anderson, 342 U.S. 415, 96 L.Ed. 460 (1952). We

think the quoted language applies here. The "special circumstances" before this Court more than justified the language Duhame now seeks to have deleted. To delete the same, we submit, would "run counter to effective judicial administration. . . "

Duhame would have this Court believe that the equities require that the language in question be deleted from the opinion. The contrary, we submit, is true.

The Duhame motion and petition should be denied.

Respectfully submitted,

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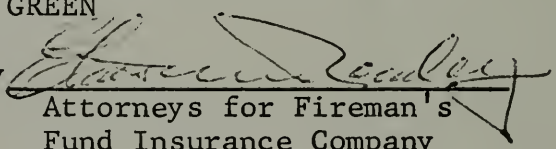
By 
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Copy of the foregoing mailed
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